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HOUSE OF REPRESENTATIVES
REPORT
101-328

CIVIL SERVICE DUE PROCESS AMENDMENTS

NOVEMBER 3, 1989.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

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Mr. FORD of Michigan, from the Committee on Post Office and Civil Service, submitted the following

REPORT

[To accompany H.R. 3086]

The Committee on Post Office and Civil Service, to whom was referred the bill (H.R. 3086) to amend title 5, United States Code, to grant appeal rights to members of the excepted service affected by adverse personnel actions, and for other purposes, having considered the same, report favorably thereon with an amendment and recommend that the bill as amended do pass.

The amendment (stated in terms of the page and line numbers of the introduced bill) is as follows:

Page 4, strike lines 12 and 13 and insert: "Veterans Health Services and Research Administration;".

EXPLANATION OF COMMITTEE AMENDMENT

The committee amendment corrects the list of agencies whose employees are excluded from coverage under section 2 of the bill to reflect the proper name of the Veterans Health Services and Research Administration.

PURPOSE

The purpose of this legislation is to extend to certain employees in the excepted service who are not preference eligibles the same administrative notice and appeal procedures currently provided employees in the competitive service and preference eligible employees in the excepted service.

COMMITTEE ACTION

On August 2, 1989, Representative Gerry Sikorski introduced H.R. 3086, a bill to provide administrative due process for certain

H623-12

excepted service employees in adverse action and unacceptable performance cases. H.R. 3086 was referred to the Committee on Post Office and Civil Service.

The Subcommittee on the Civil Service held a hearing on H.R. 3086 on September 12, 1989 (Serial No. 101-23). Testimony was presented by the Hon. Constance Newman, Director, U.S. Office of Personnel Management; Judge William Robie, President, Federal Bar Association; Mr. Jack Rollins, President, Overseas Education Association; Mr. Ed Passman, Counsel, Overseas Federation of Teachers; Mr. John Sturdivant, President, American Federation of Government Employees; Mr. James Pierce, President, National Federation of Federal Employees; and Mr. Robert Tobias, President, National Treasury Employees Union.

Written testimony was received from Robert Lowen, President, International Organization of Masters, Mates and Pilots.

On October 17, 1989, the Subcommittee on the Civil Service approved H.R. 3086 by voice vote.

On October 25, 1989, the Committee on Post Office and Civil Service ordered H.R. 3086, as amended, favorably reported by recorded vote, 22 ayes to 0 nays, a quorum being present.

SUMMARY

H.R. 3086, as amended, amends section 7511 of title 5, United States Code to clarify the existing provision and to extend that section's procedural protections to certain employees in the excepted service who have completed one year of current continuous service in an Executive agency. H.R. 3086, as amended, extends rights to most employees who have completed one year of service, but specifically excludes the following groups from coverage: (1) presidential appointees; (2) certain reemployed annuitants; (3) National Guard technicians; (4) members of the Foreign Service; (5) employees of the Central Intelligence Agency; the General Accounting Office, and the Veterans Health Services and Research Administration; and (6) employees, other than preference eligibles, of the U.S. Postal Service, the Postal Rate Commission, unless subsection (a)(1)(B) of Sec. 2 or section 1005(a) of title 39 applies to them. Nonbargaining unit employees of the Postal Service were given due process appeal rights through Public Law 100-90, thus H.R. 3086 does not limit those rights. (7) The Tennessee Valley Authority, the Federal Bureau of Investigation, and the National Security Agency.

The bill also protects the appellate rights of employees who retire during the pendency of their disputes and calls upon the MSPB to hold hearings at locations close to the appellants place of Federal employment.

STATEMENT

The Pendleton Act of 1883, which serves as the foundation of the current civil service system, set out three principles: that competitive examinations be used to determine fitness of applicants, that civil servants be politically neutral, and that civil servants have relatively secure tenure. According to the U.S. Office of Personnel Management, 55.8 percent of Federal workers were in competitive

service positions as of July 1989. This figure is down from 57 percent in September 1985.

The rest of the Federal work force, nearly 1.4 million employees are excepted from the competitive service. Of these, 835,500 are employed by the U.S. Postal Service and about 120,000 work for the Veterans Health Services and Research Administration. These employees are not covered under H.R. 3086. However, Postal Supervisors were given appeal rights during the 100th Congress under Public Law 100–90. An estimated 30 to 40 percent of the remaining 445,700 excepted service employees already have appeal rights because they are veterans' preference eligibles. In some agencies, such as the Central Intelligence Agency and the General Accounting Office, even veterans do not have appeal rights, and H.R. 3086 will not grant employees of those agencies any new rights. Of the remaining 290,000 employees some are political appointees and some are temporary workers (neither of which are covered by the legislation). The balance are attorneys, physicians, teachers (including those employed by the Department of Defense Dependents Schools and the Bureau of Indian Affairs), chaplains and scientists to whom this bill applies.

The fact that an employee is not in the competitive service does not mean that the employee can be hired or fired at whim. As an attorney who has tried to get a job at the Department of Justice knows, hiring is extremely competitive.

Nor can employees in excepted service positions be fired without notice. The requirements of constitutional due process and numerous agency grievance procedures usually require that excepted service employees be given notice and the opportunity to defend themselves before removal.

The key difference between the protections available to competitive service employees and preference eligibles in the excepted service, on the one hand, and excepted service employees who are not preference eligibles, on the other, is the right to appeal an adverse action to the Merit Systems Protection Board for independent review. H.R. 3086 eliminates that difference.

The Veterans' Preference Act of 1944 provided veterans in excepted service positions with the same appeal rights as employees in the competitive service. As a result, in some agencies wholly excepted from the competitive service nearly half of the employees are entitled to procedural protections.

The committee is aware of no problems which have occurred because of the procedural protections of the Veterans' Preference Act of 1944. Permitting veterans in excepted service positions to appeal to the Merit Systems Protection Board when they face adverse actions has not crippled the ability of agencies excepted from the competitive service to function. Therefore, the committee see no problem with extending these procedural protections to certain other employees in the excepted service.

The procedural protections provided by this legislation to certain expected service employees are spelled out in chapters 43 and 75 of title 5, United States Code. In cases involving removal, suspension for more than 14 days, reduction in grade or pay, or furlough for 30 days or less, the employee must be given 30 days advance written notice of the proposed action, an opportunity to respond in writing,

a written decision containing specific reasons for the adverse action or the specific instances of unacceptable performance, and an appeal to the Merit Systems Protection Board.

The Office of Personnel Management has argued that since these excepted service employees are not competitively hired, they should not be given due process rights in removal actions. The committee is not persuaded. First, it is not true that expected service employees are not competitively selected. While the centralized, examination-based hiring procedures which apply to the competitive service are not applicable to the excepted service, getting a job as a Government lawyer or teacher can be quite a competitive process. On the other hand, no matter how an employee is initially hired, that employee acquires certain expectations about continued employment with the Government. Excepted service employees feel no less secure in their positions than competitive service employees. They should have the same right to be free from arbitrary removal as do competitive service employees. To ensure that excepted service employees have an expectation of continuing employment with the Federal Government before any procedural rights attach, the bill provides that excepted service employees who are not preference eligible must serve one year prior to gaining procedural rights.

Last year's Supreme Court decision in *United States* v. *Fausto* makes this legislation all the more urgent. In its decision, the Supreme Court cut off an alternative method of judicial review for excepted service employees, saying that Congress, in passing the Civil Service Reform Act of 1978, had intended to deprive excepted service employees, other than those who were veterans preference eligible, of the right to challenge adverse actions. This bill explicitly provides those rights.

The excepted service consists of the following categories of employees and of certain agencies excepted from the competitive service requirements by statute:

Schedule A, positions other than those of a confidential or policy-determining character for which it is impracticable to examine. Employees in Schedule A positions include attorneys, teachers, chaplains, scientists, as well as presidential appointees and temporary and intermittent workers. The bill generally extends procedural rights to attorneys, teachers, chaplains, and scientists, but not to presidential appointees. The requirement that an employee serve one continuous year before becoming eligible for appeal rights will keep temporary employees from clogging up the Merit Systems Protection Board appeals system. Again, the key to the distinction between those to whom appeal rights are extended and those to whom such rights are not extended is the expectation of continuing employment with the Federal Government. Lawyers, teachers, chaplains, and scientists have such expectations; presidential appointees and temporary workers do not.

Schedule B, positions other than those of a confidential or policy-determining character for which it is impracticable to hold a competitive examination. Students and individuals with certain handicapping conditions may be appointed to schedule B positions. Also in Schedule B are entry-level (GS–5 and GS–7) professional and administrative positions which have been filled through the use of

Schedule B authority in the last few years because the consent decree in *Luevano* v. *Devine* abolished the Professional and Administrative Career Examination (PACE), which used to be the vehicle for filling these positions. These employees were granted notice and appeal rights by regulation of the Office of Personnel Management.

Schedule C, positions of a confidential or policy-determining character. These are political appointees who are specifically excluded from coverage under section 7511(b) of title 5. H.R. 3086 does not change the fact that these individuals do not have appeal rights.

The bill explicitly denies procedural protections to presidential appointees, individuals in Schedule C positions and individuals appointed by the President and confirmed by the Senate. Employees in each of these categories have little expectation of continuing employment beyond the administration during which they were appointed. They explicitly serve at the pleasure of the President or the presidential appointee who appointed them.

The bill explicitly excludes retirees receiving annuities from the Civil Service Retirement and Diability Fund or the Foreign Service Retirement and Disability Fund. Section 3323 of title 5, United States Code, states that reemployed annuitants serve at the will of the appointing authority.

The bill excludes National Guard technicians. While the committee is sympathetic to the pleas for better protection the technicians have made, the committee also realizes it shares jurisdiction over these individuals, who are hired under provisions of title 32, United States Code, with the Committee on Armed Services. Rather than delay this legislation to work out legislation acceptable to the Committee on Armed Services, the committee will address the issue of protection for technicians in separate legislation.

The bill excludes members of the Foreign Service because the Foreign Service Act of 1980 provides comparable procedural protections through the Grievance Board mechanism.

The bill excludes all employees of the Central Intelligence Agency, the General Accounting Office, and the Veterans Health Services and Research Administration. In each case, a separate statute excludes the employees of these agencies from the normal appeals process. The National Security Act of 1946 provides the Director of the Central Intelligence Agency (CIA) with plenary authority to deal with personnel of the CIA. The General Accounting Office Personnel Act of 1980 provides comparable procedural rights for GAO employees through the GAO personnel Appeals Board. The employees at the Veterans Health Services and Research Administration are subject to a special peer review system.

The bill limits the procedural protections for employees of the Postal Service, the Postal Rate Commission, the Tennessee Valley Authority, the Federal Bureau of Investigation (FBI), and the National Security Agency (NSA) solely to preference eligibles, thereby preserving the status quo. The committee preserved the status quo in relation to the FBI and NSA because of their sensitive missions. Nonbargaining unit employees of the Postal Service were given due process appeal rights through Public Law 100-90. Employees at the Tennessee Valley Authority already have a negotiated grievance procedure.

H.R. 3086 also makes it clear that an employee's status under any Federal retirement system or election made under such a system does not eliminate the employee's right to contest an action involving removal from the service. Simply put, the bill allows an employee who is eligible to retire but who the agency wants to fire to take his or her annuity and still challenge the adverse action before the Merit System Protection Board.

Finally, to the extent possible, whenever the Merit Systems Protection Board considers alternative places to conduct hearings, the bill requires that the proceedings be held at a location closest to the appellant's place of employment unless the total administrative cost to the Government would be lesser elsewhere.

SECTION ANALYSIS

SECTION 1—SHORT TITLE

Section 1 of the bill sets forth the short title of the bill as the "Civil Service Due Process Amendments."

SECTION 2—EXCEPTED SERVICE APPEAL RIGHTS

Section 2 of the bill addresses the appeal rights of excepted service employees.

Subsection (a) of section 2 amends section 7511 of title 5, United States Code, as explained below.

Section 7511(a), as amended by the bill, defines "employee" as (A) an individual in the competitive service who is not serving a probationary or trial period under an initial appointment or who has completed 1 year of current continuous service other than a temporary appointment limited to 1 year or less; (B) a preference eligible in the excepted service who has completed 1 year of current continuous service in the same or similar positions in an Executive Agency or in the U.S. Postal Service or the Postal Rate Commission; and (C) an individual in the excepted service (other than preference eligible) who has completed 1 year of current continuous service in the same or similar positions in an Executive Agency under other than a temporary assignment of 1 year or less.

Section 7511(a)(2) through (5) restate existing law.

Section 7511(a)(2) defines "suspension" as the placing of an employee, for disciplinary reasons, in a temporary position without duties and pay, as set forth in section 7501(2) of title 5, United States Code.

Section 7511(a)(3) defines "grade" as a level of classification under a position classification system.

Section 7511(a)(4) defines "pay" as the rate of basic pay fixed by law or administrative action for the position held by an employee.

Section 7511(a)(5) defines "furlough" as the placing of an employee in a temporary status without duties and pay because of lack of work or funds or other nondisciplinary reasons.

Section 7511(b), as amended by the bill, lists those employees who are not covered by the adverse action procedural protections in subchapter II of chapter 75 of title 5, United States Code.

Sections (b)(1), (b)(2)(B), and (b)(2)(C) restate existing law. Section 7511(b)(1) excludes an employee whose appointment is made with the advice and consent of the Senate.

Section 7511(b)(2) excludes an employee whose position has been determined to be of confidential, policy-determining, policy-making, or policy advocating character and has been excepted from the competitive service by (A) the President; (B) the Office of Personnel Management; or (C) by statute.

Section 7511(b)(3) excludes an employee who is appointed by the President (currently excluded by regulation).

Section 7511(b)(4) excludes an employee who is receiving an annuity from the Civil Service Retirement and Disability Fund or the Foreign Service Retirement and Disability Fund based on the service of the employee.

Section 7511(b)(5) excludes National Guard technicians. This is consistent with section 709(f) of title 32, United States Code, which states that sections 7511 and 7512 of title 5 do not apply to National Guard technicians.

Section 7511(b)(6) excludes members of the Foreign Service. Chapter 11 of the Foreign Service Act of 1980 (Public Law 96–465) established a grievance procedure for members of the Foreign Service.

Section (b)(7) excludes employees of the Central Intelligence Agency; the General Accounting Office; and the Veterans Health Services and Research Administration.

Section 7511(b)(8) excludes employees who are not preference eligibles in the following agencies: the U.S. Postal Service; the Postal Rate Commission; the Tennessee Valley Authority, the Federal Bureau of Investigation; and the National Security Agency. Preference eligible employees of these agencies will continue to have these appeal rights. Nonbargaining unit employees of the Postal Service were given due process appeal rights through Public Law 100–90. This bill does not take away their right to appeal.

Section 7511(b)(9) excludes aliens or noncitizens of the United States who occupy positions outside the United States.

Section 7511(c) authorizes the Office of Personnel Management to provide the procedural protections of subchapter II of chapter 75 to any group of employees which the Office has excepted from the competitive service by regulation. This is identical to existing section 7511(c). The Office of Personnel Management has used this authority to extend adverse action protection to Schedule B employees in professional and administrative career positions. However, OPM has not used this authority to extend coverage to Federal attorneys, teachers, scientists, or chaplains.

Subsection (f) of section 2 of the bill provides appeal rights to members of the excepted service for actions based on unacceptable performance. While most employees are presently entitled to 30 days written notice before a proposed performance-based action, the representation of an attorney or other representative of choice, a reasonable time to answer orally and in writing, and a written decision nonpreference eligibles in the excepted service do not have the right to appeal the written decision to the Merit Systems Protection Board. Subsection (b) extends that right of appeal to certain members of the excepted service.

Subsection (c) of section 2 of the bill states that the amendments made by section 2 apply with respect to any personnel action taking effect on or after the effective date of this Act.

SECTION 3—ANNUITANT STATUS NOT A BAR TO APPEALING ONE'S REMOVAL

Section 3 of the bill ensures that annuitant status does not bar the right to appeal one's removal. Section 7701 of title 5, United States Code, as amended by the bill, states that in determining appealability under this section involving a removal for service (other than the removal of a reemployed annuitant), neither an individual's status under any retirement system established by or under Federal statute nor by any election made by such individual under any such section may be taken into account. This section allows an employee who is eligible to retire but who the agency wants to fire to take his annuity and still challenge the adverse action before the Merit Systems Protection Board.

SECTION 4—LOCATION OF MSPB HEARINGS

Section 4 of the bill amends section 1204(e)(1) of title 5, United States Code, to direct the Merit System Protection Board to conduct proceedings at a location close to an appellant's place of employment unless it would cost the government less to hold such proceedings elsewhere. Merit Systems Protection Board hearings are presently held in certain designated regional cities.

SECTION 5—EFFECTIVE DATE

Section 5 of the bill, provides that the Act, and, with the exception of the timing of personnel actions which will serve as the basis for excepted service appeal rights as prescribed in section 2(c) of the bill, shall apply to any appeal or other proceeding brought on or after that day.

COST

The committee did not receive a cost estimate from the Congressional Budget Office in a timely manner for filing with this report. The committee does not expect enactment of the bill to result in any significant cost to the Federal Government.

OVERSIGHT

Under the rules of the Post Office and Civil Service Committee, the Subcommittee on the Civil Service is vested with legislative and oversight jursidiction over the subject matter of this legislation. As a result of its hearings, investigations and considerations, the subcomittee concluded that there is ample need and justification for the enactment of this legislation.

The committee received no report of oversight findings or recommendations from the Committee on Government Operations pursuant to clause 4(c)(2) of House Rule X.

INFLATIONARY IMPACT STATEMENT

Pursuant to clause 2(l)(4) of House Rule XI, the committee has concluded that the enactment of H.R. 3086 will have no inflationary impact on the national economy.

ADMINISTRATION VIEWS

Set forth below are the letters received by the committee from the Merit Systems Protection Board on H.R. 3086.

U.S. MERIT SYSTEMS PROTECTION BOARD,
Washington, DC, September 20, 1989.

Hon. WILLIAM D. FORD,
Chairman, Committee on Post Office and Civil Service, House of Representatives, Washington, DC.

DEAR MR. CHAIRMAN: This is in response to your letter inviting the comments of the U.S. Merit Systems Protection Board on H.R. 3086, the Civil Service Due Process Amendments, which extends the procedural and appellate rights that Federal employees in the competitive service presently have to certain excepted service employees. We appreciate the opportunity to present our views on the proposed legislation.

The Board is charged under the Civil Service Reform Act with responsibility for protecting the Federal merit systems against prohibited personnel practices, protecting covered Federal employees from reprisal, and ensuring that agencies base employment decisions on individual merit. As we set forth more fully in the enclosed statement, H.R. 3086 substantially expands the Board's jurisdiction and will thereby increase the Board's jurisdiction and will thereby increase the Board's workload and its costs. Another provision in the bill, which establishes requirements for Board hearing locations, will also affect significantly the Board's operations and its costs. In order to be as helpful as possible, the Board has focused on the practical impact of the bill on Board operations.

Again, we are pleased to have the opportunity to comment on the bill. We hope these comments will be of assistance to you in your deliberations. If we can be of any further assistance on this or any other matters, please let me know.

Sincerely,

MARY L. JENNINGS,
Acting General Counsel.

Enclosure.

STATEMENT FOR THE RECORD BY THE U.S. MERIT SYSTEMS PROTECTION BOARD

H.R. 3086, the Civil Service Due Process Amendments, would amend Title 5 of the United States Code to extend the same procedural and appellate rights that apply to employees in the Federal competitive civil service to certain employees in the Government's excepted service. The Board is charged under the Civil Service Reform Act with responsibility for protecting covered Federal employees from reprisal and providing remedies for prohibited personnel practices, and strongly endorses the underlying merit systems

principles. H.R. 3086 affects the Board directly, expanding the Board's jurisdiction and changing its practice with regard to hearings in employee appeals. In an effort to be as helpful and informative as possible regarding H.R. 3085, the Board will focus its comments on the practical impact of the bill on Board operations.

EXTENSION OF PROCEDURAL AND APPELLATE RIGHTS TO CERTAIN EXCEPTED SERVICE FEDERAL EMPLOYEES

The bill substantially expands the scope of the Board's jurisdiction and will increase its workload. Under current law, the Board's jurisdiction is generally limited in disciplinary and performance actions to competitive service and certain preference eligible employees. Although the exact number of employees presently covered under 5 U.S.C. Chapters 75 and 43 is not known, the Office of Personnel Management (OPM) advised the Board that between 1.5 and 1.8 million employees are presently covered. These figures are based on the total number of Federal employees ("total paid" employment), after excluding certain categories of employees such as foreign nationals, certain State Department employees, and probationers. Over the last five years, the Board has averaged approximately 3,700 Chapter 75 and Chapter 43 initial appeals each year. Petitions for review are filed with Board Headquarters in approximately 20 percent of these cases (averaged over the last two years).

The number of excepted service employees covered by H.R. 3086 and the predicted number of initial appeals and petitions for review can likewise only be limited. OPM advised the Board that it estimates the bill will cover between 20,000 to 300,000 additional employees. OPM's figures are based on the number of "total paid" excepted service employment figures, after excluding the categories of excepted service employees not covered by the bill—such as political appointees, probationers, veterans (who are already covered as preference eligibles), and certain special groups, such as the foreign service and intelligence agency employees.

The board's estimate of the number of new cases that it will receive upon enactment of H.R. 3086 assumes that the covered excepted service employees will file appeals of personnel actions under Chapters 75 and 43 and petitions for review of initial decisions at approximately the same rate as presently covered employees. If the bill is enacted, the Board estimates that it will receive approximately 400 to 750 additional initial appeals and approximately 90 to 150 additional petitions for review, an increase of approximately 6 to 11 percent in each category. The Board estimates that the cost of processing these additional cases will be between $600,000 and $1,100,000.

LOCATION OF BOARD HEARINGS

The bill requires that the Board hold hearings—"to the extent practicable"—at a location close to the appellant's place of employment "unless the total administrative costs to the Government in conducting such proceeding would be lesser elsewhere." This provision will significantly affect the Board's existing practice.

The Board's policy of using a number of approved—or fixed—hearing sites, which we have explained in some detail below, has

been in place for a number of years and no particular problems have been brought to the Board's attention. In individual cases, the Board's regulations provide that a party may request that a hearing be held at a location other than an approved site. To better serve the litigants before it, the Board has also over the years added to the number of approved locations and changed the designated cities. The Board's present policy is thus working well. The Board is wary of tinkering with this policy in the absence of specific complaints.

1. THE BOARD'S PRESENT POLICY

The Board's present practice is to group the hearings in several initial appeals and to hold these grouped hearings at one of a number of approved sites throughout the country. The fixed site hearing policy adopted by the Board is not rigid or static but allows the Board to respond to the needs and interests of the parties while efficiently processing cases with the resources available to it.

In selecting fixed hearing sites, the Board starts with the general principle that the parties should not be expected to travel more than 100 miles to attend a Board hearing. The Board presently has designated 107 cities as approved hearing sites. Because of the large number of fixed sites designated by the Board and the proximity of the fixed sites to the areas that historically have generated most of the appeals to the Board, convenience and cost considerations are built into the fixed site policy. The Board periodically reviews its approved hearing sites to determine if they are still appropriate. Over the years, the Board has increased the number of approved sites; there are presently 15 more sites than the 92 locations listed in 1982.

In scheduling a hearing in any particular case, the Board tries to select the approved hearing site most convenient and accessible to the parties. In most instances, the hearings are held at the approved site that is closest to the city in which the appellant is or was employed. Moreover, the Board permits parties to request that the hearing be held at a location other than the approved site if it would be "more advantageous" to do so—that is, if another location would facilitate the fair, just and expeditious processing and adjudicating of an appeal. Factors that the Board considers in determining whether to hold a hearing at a location other than an approved site include the convenience of the parties, costs, timely processing, disruption of agency operations, and personal hardship to an appellant. Convenience to the parties is measured not only in terms of the distance to the fixed hearing site but also the availability of adequate transportation, the ease of access to the fixed site location, and the anticipated length of the hearing.

The Board's practice of using approved hearing sites is working well. During Fiscal Year 1988, the Board held hearings in 1,237 initial appeals, 19 percent of the 6,402 initial appeals it handled. In the Board's experience, the flexibility to group several initial appeals for hearing in the fixed site for the same week has promoted efficient use of the administrative judge's time and may well have played a role in its expeditious handling of initial appeals. Grouped hearings in designated cities have also eased the difficulty of ob-

taining the services of court reporters and permitted the Board to negotiate more favorable contracts for these services on an annual basis.

No particular problems with the fixed site policy have been brought to the Board's attention. In most cases, the Board has accommodated requests for a change in the location of a hearing. Although the Board's regional offices do not have complete records of the number of requests for a change in the location of the hearing that were made during the last fiscal year, from the figures that the Board has available, it appears that only approximately 90 requests for change in hearing location were made and over 70 of those requests were granted. Thus, in less than two percent of the cases heard was a party sufficiently dissatisfied with the hearing site to file a request for change in location.

2. THE EFFECT OF THE HEARING LOCATION PROVISION ON BOARD OPERATIONS

The provision in H.R. 3086 establishing requirements for Board hearing locations does not mandate that hearings be held at any particular location. The requirement that Board hearings be held close to the place of employment in the normal course will, however, affect the Board's processing of cases and in all likelihood increase the costs incurred by the Board in the course of such processing.

The bill appears to require the Board to consider in every case where the hearing should be held—a procedure that is likely to lengthen the case handling process. Initially, the Board will have to determine whether there is a site close to the place of employment that is "practicable." In some remote locations, the only feasible site would be at the agency itself. In some secured installations, the appellants are not permitted access to the former employment site. In other cases, the employment site may be viewed as a hostile rather than a neutral environment.

Arranging for court reporting services will also be a factor in whether certain sites are practicable for Board hearings. If hearings are held in a variety of locations, many court reporting contracts will have to be negotiated on a case-by-case rather than an annual basis. The Board has experienced some difficulty and additional costs in obtaining court reporters in remote locations. Because the average length of a Board hearing is between four to five hours, grouping hearings at a fixed site assists the Board in obtaining bids at more favorable rates from court reporting services.

If it turns out that under this bill most cases are heard at sites at appelants' various places of employment, the Board may not be able to process appeals as quickly as it has in the past and the Board will incur increased travel costs. Most of the Board's regional offices estimate that hearings at sites other than the fixed sites established by the Board will require increased travel for the administrative judges and decrease their productivity. The estimated increase in travel depends to some extent on the size of the region and the accessibility of the locations of large Federal employers. The anticipated increase in travel will add to the Board's travel costs; to the extent that it affects the productivity of the adminis-

trative judges, it may well lengthen the time required to process initial appeals.

The Board's first interest is, of course, in protecting the Federal merit systems against abuses by agency management and ensuring that agencies base employment decisions on individual merit. The Board believes that its present policy with regard to the location of hearings reflects a careful balance between competing interests and that the policy is working successfully. To the extent that those competing interests weigh in favor of change, the Board believes that any necessary changes can continue to be successfully accomplished administratively and without legislation.

If the Congress determines, however, to retain the provision in H.R. 3086 establishing new requirements for Board hearing locations, the Board suggests that the provision be modified to require establishment of a revolving fund to reimburse the Board for the cost of hearings. A revolving fund to which agencies would contribute a flat fee—without regard to the complexity or length of a particular hearing—would deal with the expenses question in a comprehensive fashion. Financing hearings out of a revolving fund should permit the Board to implement the hearing provision of H.R. 3086 despite increased costs while defusing any arguments about the cost of any particular hearing.

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3 of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, existing law in which no change is proposed is shown in roman):

TITLE 5, UNITED STATES CODE

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PART II—CIVIL SERVICE FUNCTIONS AND RESPONSIBILITIES

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CHAPTER 12—MERIT SYSTEMS PROTECTION BOARD, OFFICE OF SPECIAL COUNSEL, AND EMPLOYEE RIGHT OF ACTION

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§ 1204. Powers and functions of the Merit Systems Protection Board and Special Counsel

(a) * * *

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(e)(1)(A) * * *

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(C) Whenever it considers alternative places for conducting a hearing or other proceeding brought by or on behalf of an employee, former employee, or applicant for employment, the Board shall, to the extent practicable, select the place closest to the location of the position held, formerly held, or sought by the individual involved, unless the total administrative costs to the Government in conducting such proceeding would be lesser elsewhere.

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PART III—EMPLOYEES

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Subpart C—Employee Performance

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CHAPTER 43—PERFORMANCE APPRAISAL

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Subchapter I—General Provisions

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§ 4303. Actions based on unacceptable performance

(a) * * *

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(e) Any employee [who is a preference eligible or is in the competitive service and] who has been reduced in grade or removed under this section is entitled to appeal the action to the Merit Systems Protection Board under section 7701 of this title.

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Subpart F—Labor-Management and Employee Relations

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CHAPTER 75—ADVERSE ACTIONS

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Subchapter II—Removal, Suspension for More Than 14 Days, Reduction in Grade or Pay, or Furlough for 30 Days or Less

[§ 7511. Definitions; application

[(a) For the purpose of this subchapter—

[(1) "employee" means—

[(A) an individual in the competitive service who is not serving a probationary or trial period under an initial appointment or who has completed 1 year of current continu-

ous employment under other than a temporary appointment limited to 1 year or less; and

[(B) a preference eligible in an Executive agency in the excepted service, and a preference eligible in the United States Postal Service or the Postal Rate Commission, who has completed 1 year of current continuous service in the same or similar positions;

[(2) "suspension" has the meaning as set forth in section 7501(2) of this title;

[(3) "grade" means a level of classification under a position classification system;

[(4) "pay" means the rate of basic pay fixed by law or administrative action for the position held by an employee; and

[(5) "furlough" means the placing of an employee in a temporary status without duties and pay because of lack of work or funds or other nondisciplinary reasons.

[(b) This subchapter does not apply to an employee—

[(1) whose appointment is made by and with the advice and consent the of Senate;

[(2) whose position has been determined to be of a confidential, policy-determining, policy-making or policy-advocating character by—

[(A) the Office of Personnel Management for a position that it has excepted from the competitive service; or

[(B) the President or the head of an agency for a position which is excepted from the competitive service by statute.

[(c) The Office may provide for the application of this subchapter to any position or group of positions excepted from the competitive service by regulation of the Office.]

§ 7511. Definitions; application

(a) For the purpose of this subchapter—

(1) "employee" means—

(A) an individual in the competitive service—

(i) who is not serving a probationary or trial period under an initial appointment; or

(ii) who has completed 1 year of current continuous service under other than a temporary appointment limited to 1 year or less;

(B) a preference eligible in the excepted service who has completed 1 year of current continuous service in the same or similar positions—

(i) in an Executive agency; or

(ii) in the United States Postal Service or the Postal Rate Commission; and

(C) an individual in the excepted service (other than a preference eligible) who has completed 1 year of current continuous service in the same or similar positions in an Executive agency under other than a temporary appointment limited to 1 year or less;

(2) "suspension" has the same meaning as set forth in section 7501(2) of this title;

(3) "grade" means a level of classification under a position classification system;

(4) "pay" means the rate of basic pay fixed by law or administrative action for the position held by an employee; and

(5) "furlough" means the placing of an employee in a temporary status without duties and pay because of lack of work or funds or other nondisciplinary reasons.

(b) This subchapter does not apply to an employee—

(1) whose appointment is made by and with the advice and consent of the Senate;

(2) whose position has been determined to be of a confidential, policy-determining, policy-making or policy-advocating character by—

(A) the President for a position that the President has excepted from the competitive service;

(B) the Office of Personnel Management for a position that the Office has excepted from the competitive service; or

(C) the President or the head of an agency for a position excepted from the competitive service by statute;

(3) whose appointment is made by the President;

(4) who is receiving an annuity from the Civil Service Retirement and Disability Fund, or the Foreign Service Retirement and Disability Fund, based on the service of such employee;

(5) who is described in section 8337(h)(1), relating to technicians in the National Guard;

(6) who is a member of the Foreign Service Act of 1980;

(7) whose position is within the Central Intelligence Agency, the General Accounting Office, or the Veterans Health Services and Research Administration;

(8) whose position is within the United States Postal Service, the Postal Rate Commission, the Tennessee Valley Authority, the Federal Bureau of Investigation, or the National Security Agency, unless subsection (a)(1)(B) of this section 1005(a) of title 39 is the basis for this subchapter's applicability; or

(9) who is described in section 5102(c)(11) of this title.

(c) The Office may provide for the application of this subchapter to any position or group of positions excepted from the competitive service by regulation of the Office which is not otherwise covered by this subchapter.

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CHAPTER 77—APPEALS

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§ 7701. Appellate procedures

(a) * * *

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(j) In determining the appealability under this section of any case involving a removal from the service (other than the removal of a reemployed annuitant), neither an individual's status under any retirement system established by or under Federal statute nor any

election made by such individual under any such system may be taken into account.

[(j)] *(k)* The Board may prescribe regulations to carry out the purpose of this section.

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